(1) Supreme Court, U.S.
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NO.

IN THE SUPREME COURT OF THE UNITED STATES

STEVEN EUGENE PASSMORE, Petitioner
v.
UNITED STATES OF AMERICA, Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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June 2000

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QUESTIONS PRESENTED

I. Whether the United States Court of Appeals had jurisdiction under 18 U.S.C. § 3731 to hear the government's appeal of the United States District Court's finding that there was insufficient evidence to establish the existence of multiple conspiracies rather than one single conspiracy in order to avoid the defendant's double jeopardy defense?

II. Whether the government may avoid the double jeopardy clause by presenting evidence to show that there were multiple smaller conspiracies when that evidence contradicts the face of the indictments which charged a single large conspiracy?

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IN THE SUPREME COURT OF THE UNITED STATES

STEVEN EUGENE PASSMORE, Petitioner
v.
UNITED STATES OF AMERICA, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The petitioner, Steven Eugene Passmore, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in the above-entitled proceeding on February 17, 2000.

OPINIONS BELOW

The unreported opinion of the United States Court of Appeals for the Eleventh Circuit was entered on February 17, 2000 and appears at App. 1-19. The unreported order of the United States Court of Appeals for the Eleventh Circuit denying a petition for rehearing was filed on March 28, 2000 and appears at App. 20-21.

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on February 17, 2000. A timely petition for rehearing was denied on March 28, 2000. The jurisdiction of this Court to review the judgment of the United States Court of Appeals for the Eleventh Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution:

> No persons shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; *nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb;* nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of law;* nor shall private property be taken for public use, without just compensation. (emphasis added).

18 U.S.C. § 3731:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court

dismissing an indictment or information or granting a new trial after verdict or judgment, as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

An appeal by the United States shall lie to a court of appeals from a decision or order of a district court suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding, not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information, if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.

An appeal by the United States shall lie to a court of appeals from a decision or order, entered by a district court of the United States, granting the release of a person charged with or convicted of an offense, or denying a motion for revocation of, or modification of the conditions of, a decision or order granting release.

The appeal in all such cases shall be taken within thirty days after the decision, judgment or order has been rendered and shall be diligently prosecuted.

The provisions of this section shall be liberally construed to effectuate its purposes.

STATEMENT OF THE CASE

This case involves an appeal from an order granting Mr. Passmore's motion to dismiss based upon a finding that the prosecution of Mr. Passmore violated double jeopardy.

Mr. Passmore was indicted by a grand jury in the Northern District of Florida on February 22, 1996. (R1-1). (The Northern District case). Count I of the indictment read as follows:

> That from an unknown date, but at least by February 24, 1991, and continuing through the date of the return of this indictment, in the Northern District of Florida and elsewhere, the defendant, STEVEN EUGENE PASSMORE, did unlawfully combine, conspire, confederate, and agree, and have a tacit understanding with other persons, to knowingly and intentionally possess with the intent to distribute the controlled substances cocaine and cocaine base, also known as "crack cocaine," in violation of Title 21, United States Code, Sections 841(a)(1) and (b)(A)(ii) and (iii).
>
> All in violation of Title 21, United States Code, Section 846.

(R1-1).

Mr. Passmore was also indicted by a federal grand jury in the Middle District of Florida. (The Middle District case). Count I of the superseding indictment in that case alleged the following:

> From in or about 1986, through in or about December 1997, at Jacksonville, in the Middle District of Florida, and elsewhere, STEVEN EUGENE PASSMORE...the defendant herein, did knowingly, willfully, and intentionally combine, conspire, confederate and agree with other persons known and unknown to distribute cocaine and cocaine base, commonly known as crack, both Schedule II substances, in violation of Title 21, United States Code, Section 841 (a)(1).
>
> ....
>
> All in violation of Title 21, United States Code, Section 846.

(R1-30 (Court Exh. No. 1), R3-6-7, 18).

At the close of the government's case, Mr. Passmore moved to dismiss the Northern District indictment on the grounds of double jeopardy. (R3-2). The basis for the double jeopardy motion was the fact that Mr. Passmore had plead guilty to an indictment in the Middle District that

encompassed the same conspiracy that was the subject matter of the Northern District indictment. (R3-5-17).

The government's response was that double jeopardy had not been violated because the evidence established that Mr. Passmore had been involved in two separate conspiracies with one conspiracy involving a group in Jacksonville and another conspiracy involving a group in Fort Walton Beach. (R3-20-21, 30-31).

The district court then analyzed the two indictments. In doing so, the court stated the following:

> [L]et's look at the two charges. I mean we've got two conspiracy charges that are extremely broad, even broader than the normal conspiracy charge, because each encompass the period of time ranging either from an unknown date, but at least 1991, or going back to 1986 up through—one of them goes up through February of '96, and the other one goes all the way up, apparently, to December of '97. And they both charge a conspiracy, not only of one substance, but two substances, cocaine and cocaine base. And they also don't identify any other co-conspirators, just say other persons known and unknown. And it also, in terms of the geographic area, they both say either the Middle District of Florida or the Northern District of Florida, and elsewhere, which

> essentially covers the rest of the world. So you superimpose these two and they're virtually the same.

(R3-28-29). As for the government's claim that there were two separate conspiracies with Mr. Passmore the source of supply for one group in Jacksonville and another group in Fort Walton Beach, the court found that "[the government] didn't charge that." (R3-19). The district court then granted Mr. Passmore's motion. (R3-40-43; R1-31-1).

The government then appealed this decision to the United States Court of Appeals for the Eleventh Circuit. (R1-32).

The Eleventh Circuit rendered its decision on February 17, 2000. *United States v. Passmore*, No. 99-12325 (11th Cir. Feb. 17, 2000); App. 1-19. In its opinion, the court first stated that it had jurisdiction to hear the government's appeal under 18 U.S.C. § 3731 because the district court's decision was not based upon a finding that there was insufficient evidence to convict Mr. Passmore. *Id.* at 11; App. 10-12. As for the district court's double jeopardy finding, the court stated that there were five factors to consider in determining whether there were single or multiple conspiracies. *Id.* at 15; App 14. These five factors were:

> (1) time, (2) persons acting as co-conspirators, (3) the statutory offenses charged in the indictments, (4) the overt acts charged by the government or any other description of the

> offense charged which indicates the nature and scope of the activity which the government sought to punish in each case, and (5) places where the events alleged as part of the conspiracy took place.

Id.; App. 14. The court held that the first and third factors weighed in Mr. Passmore's favor, but that the other factors did not. *Id.* at 15-18; App.14-17. Regarding the second factor, the court stated that:

> Because the broad language of "other persons known and unknown" is present in both indictments, some overlap is conceivable. This is not a case, however, where the double jeopardy motion was made prior to trial and we have limited information regarding what the evidence will show. At the time the motion to dismiss was made, the Government had concluded its evidence at trial. A review of the trial record from trial, and the materials submitted from the Middle District case, shows absolutely no evidence of any overlap in the individuals involved in the two cases other than Passmore.

Id. at 16; App. 15. As for the fourth factor, the Eleventh Circuit stated that:

> Neither indictment here charges any overt acts. And, although the descriptions of the

> acts taken in the cases show a similar pattern of activity, there is no evidence of any action by Passmore, or any co-conspirator, in one of the cases which can be said to have aided or been a part of the activity charged in the other case.

Id. at 17; App. 16. Turning to the final factor, the court stated that:

> Some overlap in location is conceivable under the broad allegations of the two indictments charging that Passmore conspired to distribute "in the Middle District of Florida and elsewhere" and "in the Northern District and elsewhere." Further, Passmore provided cocaine and cocaine base to co-conspirators in both cases in Atlanta and Jacksonville. The evidence shows, however; that the narcotics were intended to be, and were in fact, distributed in different markets.

Id. at 17-18; App. 16. In examining these five factors, the Eleventh Circuit went beyond the four corners of the indictments in question in making its decision.

The Eleventh Circuit then reversed the dismissal of the Northern District indictment. *Id.* at 20; App. 19.

REASONS FOR GRANTING THE WRIT

A grant of review by this Court is needed in order to settle two important questions of law. First, review by this Court will settle the question of whether the government can appeal a district court's factual finding that there was insufficient evidence to establish the existence of multiple conspiracies so as to avoid a defendant's double jeopardy defense. Second, review by this Court will also settle the question of whether the government can avoid a double jeopardy defense by presenting evidence to establish that there were multiple smaller conspiracies when that evidence contradicts the face of the indictments drafted by the government which only charged a single large conspiracy. The resolution of these two important questions of law will have a significant impact in any case involving the double jeopardy clause. Moreover, a decision on these two important issues will insure the uniformity of decisions in the courts and the uniformity of behavior among prosecutors in the drafting of indictments.

I. THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DID NOT HAVE JURISDICTION TO HEAR THE GOVERNMENT'S APPEAL AS THE DISTRICT COURT'S FINDING THAT THERE WAS INSUFFICIENT EVIDENCE TO ESTABLISH THE EXISTENCE OF MULTIPLE CONSPIRACIES WAS AN ACQUITTAL UNDER THE DOUBLE JEOPARDY CLAUSE AND THUS THE GOVERNMENT'S APPEAL WAS BARRED BY THIS COURT'S OPINIONS IN *BURKS V. UNITED STATES*, 437 U.S. 1 (1978) AND

UNITED STATES V. SCOTT, 437 U.S. 82 (1978).

The United States Court of Appeals for the Eleventh Circuit did not have jurisdiction to hear this appeal as the district court's finding that there was insufficient factual evidence to demonstrate the existence of two separate conspiracies amounted to an acquittal which in turn barred the government's appeal. 18 U.S.C. § 3731 authorizes governmental appeals in criminal actions, but states that "no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution." The rule is settled that "[a] judgment of acquittal, whether based on a jury verdict of not guilty or on a ruling by the court that the evidence is insufficient to convict, may not be appealed...." *See United States v. Scott*, 437 U.S. 82, 91 (1978) (footnote omitted).[1]

The most important case in this regard is *Burks v. United States*, 437 U.S. 1 (1978). In *Burks*, the accused had

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[1] The fact that the district court did not characterize its decision as an acquittal is not important. That is because this Court has declared that the label used by the trial court in characterizing its decision as an acquittal or a dismissal is not dispositive as "the trial judge's characterization of his own action cannot control the classification of the action." *Scott*, 437 U.S. at 96. *See also Smalis v. Pennsylvania*, 476 U.S. 140 (1986) (Pennsylvania Supreme Court's characterization of a defendant's demurrer as an election to seek a dismissal rather than an effort to seek a ruling as a matter of law that the state's evidence was insufficient factually to establish his guilt was not binding on the United States Supreme Court). Thus, the fact that the district court entered an order of dismissal rather than an order of acquittal is not dispositive.

been charged with armed robbery and he pled insanity. The appellate court concluded that the defendant's motion for an acquittal had been erroneously denied because the defendant had set forth a prima facie defense of insanity and the government had failed to rebut that defense beyond a reasonable doubt. *Id.* at 2-5. This Court held that since the appellate court had concluded that the evidence was insufficient to convict the defendant, he could not be retried on double jeopardy grounds. This Court held that there was a distinction between reversals due to trial error and reversals resulting from evidentiary insufficiency. *Id.* at 14-15. It stated that:

> In short, reversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case. As such, it implies nothing with respect to the guilt or innocence of the defendant. Rather, it is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect, e.g., incorrect receipt or rejection of evidence, incorrect instructions, or prosecutorial misconduct....
>
> The same cannot be said when a defendant's conviction has been overturned due to a failure of proof at trial, in which case the prosecution cannot complain of prejudice, for it has been given one fair opportunity to offer

> whatever proof it could assemble. (footnote omitted). Moreover, such an appellate reversal means that the government's case was so lacking that it should not have even been submitted to the jury. Since we necessarily afford absolute finality to a jury's verdict of acquittal—no matter how erroneous its decision—it is difficult to conceive how society has any greater interest in retrying a defendant when, on review, it is decided as a matter of law that the jury could not properly have returned a verdict of guilty.

Id. at 15-16.

The same reasoning applies in this case. The defendant here set forth a prima facie case that his prosecution was barred because there was only one single conspiracy rather than two separate conspiracies. The government then failed to present sufficient evidence to rebut the defendant's case or to prove that there were two separate conspiracies rather than one conspiracy. The district court explicitly found that the defendant had set forth a prima facie case and that the government had presented *insufficient evidence* to rebut his defense or to show that there were two separate conspiracies. The trial court's decision was not based upon some finding that there had been trial error or some fundamental defect in the judicial process. It was based upon a finding that there was *insufficient evidence* to establish that there was a single

conspiracy rather than two separate conspiracies and that therefore the double jeopardy clause barred the defendant's prosecution. (R3-28-41). In short, the trial court's decision was based upon a failure of proof by the government at trial. As such, the district court's decision was an acquittal that could not be appealed by the government.

The Eleventh Circuit's decision rejecting this argument was based upon an erroneous reading of another United States Supreme Court decision, *United States v. Scott*, 437 U.S. 82 (1978). In its opinion, the lower appellate court stated that *Scott* "[D]rew a distinction between cases in which there has been a finding on the issue of factual guilt or innocence and those cases in which the defendant sought to terminate the proceedings without submission to either a judge or jury as to factual guilt or innocence." *See Passmore*, No. 99-12325, at 11; App. 11. The Eleventh Circuit then stated that *Scott* had held that decisions on issues such as insanity or entrapment fell into the first category, but that decisions on issues such as pre-indictment delay fell into the latter category. *Id.* at 11-14; App. 11. The Eleventh Circuit then held that Mr. Passmore's double jeopardy claim fell into the latter category and thus was barred by *Scott*. *Id.*; App. 11.

The problem with the Eleventh Circuit's analysis of *Scott* is that it ignores the fact that the defendant's defense is based upon a factual issue that can be resolved by a jury. This is because the general rule is that the question of whether there is one conspiracy or several conspiracies is primarily a factual question for a jury to resolve. *See United*

States v. Gonzalez, 940 F.2d 1413 (11th Cir. 1991); *United States v. Stitzer*, 785 F.2d 1506, 1518 (11th Cir. 1986). As such, the district court's double jeopardy decision was similar to an insanity or entrapment decision rather than a pre-indictment delay decision. Decisions on issues such as pre-indictment delay are the type of issues that are not submitted to a jury for a factual finding. However, decisions on issues such as insanity, entrapment, or the existence of single or multiple conspiracies are the type of issues that can be submitted to a jury for a factual finding. Consequently, when the district court in this case found that there was *insufficient evidence* to submit the question of whether there was one conspiracy or several conspiracies to the jury for resolution, it was necessarily entering an acquittal for the defendant due to insufficient evidence. Accordingly, the government cannot appeal the district court's decision.

II. THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT ERRED IN HOLDING THAT THE GOVERNMENT CAN AVOID THE BAR OF THE DOUBLE JEOPARDY CLAUSE BY PRESENTING EVIDENCE THAT THERE WERE MULTIPLE SMALLER CONSPIRACIES WHEN THAT EVIDENCE CONTRADICTS THE FACE OF THE INDICTMENTS WHICH ONLY CHARGED A SINGLE LARGE CONSPIRACY AND THIS HOLDING IS CONTRARY TO THE DECISION OF THE FIFTH CIRCUIT IN *UNITED STATES V. ATKINS*, 834 F.2D 426

(5TH CIR. 1987), *OVERRULED ON OTHER GROUNDS*, 933 F.2D 325 (5TH CIR. 1991).

The United States Court of Appeals for the Eleventh Circuit erred in holding that the government can avoid a double jeopardy defense by presenting evidence that there were two separate conspiracies involved when the indictments at issue charged a single large conspiracy. Specifically, the language of the two indictments at issue here both *charged* a worldwide conspiracy to distribute cocaine and cocaine base in violation of 21 U.S.C. § 846. (R1-1, R1-30 (Court Exh. No. 1), R3-6-7, 18). Accordingly, when Mr. Passmore pled guilty to the worldwide conspiracy indictment in the Middle District of Florida, he could no longer be prosecuted for the same worldwide conspiracy in the Northern District of Florida. The government could not avoid this result by arguing that the Middle District conspiracy involved the Jacksonville market and the Northern District conspiracy involved the Fort Walton Beach market. The reason for this is simple-The Middle District indictment *did not charge* a conspiracy involving the Jacksonville market and the Northern District indictment *did not charge* a conspiracy involving the Fort Walton Beach market. It was for that reason that the district court rejected the government's argument that there were two separate conspiracies as the district court held that "[the government] didn't charge that." (R3-19).

The fact that the Eleventh Circuit erroneously considered evidence beyond the four corners of the indictments at issue in considering the defendant's double

jeopardy motion is evident from the fact that the lower court's analysis focused on whether the evidence in the two cases established single or multiple conspiracies. *See Passmore*, No. 99-12325, at 16-18; App. 13-17. But the question is not whether the evidence showed single or multiple conspiracies. The question is whether the government *charged* single or multiple conspiracies. To that question, there can be only one answer - the government in both cases *charged* a conspiracy that covered the world. The only way that the government can dispute this fact is to offer evidence that *contradicts* the charges set forth in the two indictments. As such, the defendant's double jeopardy rights were violated as he was *charged and tried* twice for a worldwide conspiracy.

In this regard, the Eleventh Circuit's decision is in direct conflict with a decision of the Fifth Circuit - *United States v. Atkins*, 834 F.2d 426 (5th Cir. 1987), *overruled on other grounds*, 933 F.2d 325 (5th Cir. 1991). *Atkins* held that "If the face of the indictments clearly prove a double jeopardy violation under the ... five-factor test, of course, a court has no reason to resort to any other evidence." *Id.* at 440. Thus, *Atkins* establishes that a court must first determine if the face of the indictments establish a double jeopardy violation before it can consider any other evidence. In making this decision, the *Atkins* court explored the danger of double jeopardy problems in conspiracy cases. The court stated that:

> As our cases demonstrate, our concern is caused by the freedom which the government

has in drafting an indictment. (footnote and citations omitted). Through the years, we have seen this freedom manifest itself in indictments which vaguely refer to agreements "beginning on or before" or "continuing from" a certain time, made in one or two named jurisdictions and "elsewhere," between the person indicted and "other persons to the grand jury known or unknown." Although we understand the importance, from both the government's and society's perspective, of permitting broad indictments, we also recognize the dangers of such indictments. As the Fourth Circuit eloquently explained:

> Blanket charges of "continuing" conspiracy with named defendants and with "other persons to the grand jurors unknown" fulfil [sic] a useful purpose in the prosecution of crime, but they must not be used in such a way as to contravene constitutional guaranties. If the government sees fit to send an indictment in this general form charging a continuing conspiracy for a period of time, it must do so with the

> understanding that upon conviction or acquittal further prosecution of that conspiracy during the period charged is barred, and that this result cannot be avoided by charging the conspiracy to have been formed in another district where overt acts in furtherance of it were committed, or by charging additional objects or the violation of additional statutes as within its purview, if in fact the second indictment involves substantially the same conspiracy as the first....The constitutional provision against double jeopardy may not be thus nullified by the mere forms of criminal pleading.
>
> *Short v. United States*, 91 F.2d 614, 624 (4th Cir. 1937); *accord Broce*, 781 F.2d at 799, 804 (McKay, J., concurring) (Seymour, J., concurring in part and dissenting in part).

Id. at 439.

Atkins is crucial to understanding the proper application of the double jeopardy clause in this case. Here,

it is undisputed that the government decided to prosecute the defendant in the Middle District for a conspiracy that as the district court found "essentially cover[ed] the rest of the world." (R3-28-29). Applying the reasoning of *Atkins* to this case, the government, having decided to prosecute the defendant for a conspiracy that covered the world, cannot now seek to prosecute him again by arguing that the Middle District case involved a Jacksonville conspiracy and the Northern District case involved a Fort Walton Beach conspiracy. The government simply did not charge that in its indictments. In fact, this case is an even stronger case than *Atkins* because here the government did not even try to change the indictments to charge different conspiracies. Instead, the government charged the same worldwide conspiracy in both indictments and then tried to argue that there were two separate conspiracies involving a Jacksonville market and a Fort Walton Beach market based upon the facts of each case.

Simply put, the government must be held to the charges it alleged in its indictments. When the government charges a conspiracy that covers the world, it cannot later claim that the evidence really shows that there was a Jacksonville conspiracy and a Fort Walton Beach conspiracy. Fundamental notions of fairness and due process require that the government must be held to the charges set forth in the indictments it drafted. *See Atkins*, 834 F.2d at 439. To allow the government to escape the consequences of the decisions it made in drafting its indictments is to permit the government to engage in behavior that is similar to a bait and switch tactic. It improperly allows the government to

try a defendant for conspiracies that it did not charge. This tactic is particularly improper when a defendant has plead guilty to a single large conspiracy and then faces an effort by the government to try him for an allegedly smaller separate conspiracy which was covered in an earlier case. The government must be held to the charges set forth in its indictments and it cannot avoid them by arguing that the facts show that there were actually two separate conspiracies rather than the single conspiracy charged in its indictments.

CONCLUSION

For the reasons expressed above, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

Respectfully Submitted,

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STEVEN EUGENE PASSMORE, Petitioner
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June 2000

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-12325

Non-Argument Calendar

D. C. DOCKET NO. 96-00009-CR-1

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

versus

STEVEN EUGENE PASSMORE,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Florida

(February 17, 2000)

Before BLACK, HULL, and MARCUS, Circuit Judges.

PER CURIAM:

The Government appeals the district court's dismissal of the indictment against Defendant Steven Eugene Passmore on double jeopardy grounds. The Government argues that the district court incorrectly concluded that the indictment in this Northern District case and the indictment in a separate case in the Middle District of Florida encompass a single conspiracy to distribute cocaine and cocaine base, when in fact the activities involved in the two cases constitute two separate conspiracies. Alternatively, the Government asserts that the district court improperly granted defendant Passmore's motion to dismiss without allowing it to present additional evidence to show multiple conspiracies in an evidentiary hearing. After review, we conclude that the two indictments allege two separate conspiracies. Accordingly, we reverse the district court's dismissal of the indictment in this case.

I. Procedural History

A. The Middle District Indictment

Passmore was indicted by a grand jury in the Middle District of Florida on April 16, 1998 (the "Middle District indictment"). The Middle District indictment charged a conspiracy beginning in 1986 and continuing through December of 1997. According to the indictment, "at Jacksonville, in the Middle District of Florida, and elsewhere," Passmore, under his given name and eight aliases, "did knowingly, willfully, and intentionally combine, conspire, confederate and agree with other persons known and unknown to distribute cocaine and cocaine base" in violation of 21 U.S.C § 846. The Middle District indictment also charged Passmore with money laundering and a substantive count of distribution of cocaine, and included a general forfeiture provision.

On February 3, 1996, a warrant was issued for Passmore's arrest on the Middle District indictment. On September 9, 1998, Passmore entered into a plea agreement with the Government. Pursuant to this agreement, Passmore agreed to plead guilty to the conspiracy and money laundering charges. In return, the Government agreed, inter alia, to dismiss the distribution charge and the forfeiture counts. [1]

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[1] Passmore's guilty plea and conviction in the Middle District case were affirmed by this Court in an opinion dated October 27, 1999. See United States v. Passmore, No. 99-2443 (11th Cir. Oct. 27, 1999).

B. The Northern District Indictment

Passmore was indicted in this case by a grand jury in the Northern District of Florida on February 22, 1996 (the "Northern District indictment"). The Northern District indictment charged that:

> From an unknown date, but at least by February 24, 1991, and continuing through the date of the return of this indictment, in the Northern District of Florida and elsewhere, the defendant ... did unlawfully combine, conspire, confederate, agree, and have a tacit understanding with other persons, to knowingly and intentionally possess with intent to distribute the controlled substances cocaine and cocaine base.

The Northern District indictment also originally included a forfeiture count specifically listing two parcels of property and a Dodge Ram truck. On July 8, 1997, the district court granted the Government's motion to dismiss the forfeiture count.

Trial regarding the Northern District indictment began on June 14, 1999. At the close of the Government's case, Passmore moved for a judgment of acquittal based upon insufficient evidence which was denied by the district court. Following this ruling, Passmore moved for dismissal of the indictment on double jeopardy grounds. Passmore specifically asserted that prosecution on the Northern District indictment was barred by his plea of guilt to the Middle District indictment. The

district court granted Passmore's motion and dismissed the Northern District indictment on June 14, 1999. The Government timely appealed this ruling.

II. THE INDICTMENTS

We first review the cocaine transactions which are the basis of the two indictments in issue.

A. The Middle District Indictment

The warrant for Passmore's arrest on the Middle District Indictment contained an affidavit by Special Agent Carolyn Murphy of the Federal Bureau of Investigations ("FBI"). Murphy's affidavit stated that Louis Evans Perkins informed the FBI that he was Passmore's partner in obtaining crack cocaine from Miami and bringing it to Jacksonville for distribution from the summer of 1987 to late 1987. Perkins further stated that from late 1987 until late 1990, Passmore supplied him with crack to distribute. In late 1990, Perkins stated that he arranged for Peter Drayton to obtain cocaine from Passmore.

Peter Drayton also informed the FBI that he obtained cocaine from Passmore in late 1990 and that Passmore continued to supply him with cocaine until the middle or end of 1992. In early 1994, Drayton gave his brother Oliver McIntyre Passmore's pager number so that McIntyre could obtain cocaine from Passmore as well. Drayton also stated that he met Passmore in Atlanta in 1995 and they agreed to continue dealing in

cocaine. On December 16, 1995, Drayton received eight kilograms of cocaine from Passmore in Fort Lauderdale, Florida. The FBI then arranged for Drayton to meet Passmore in Atlanta in order to pay him for this delivery of cocaine. Passmore, however, fled the scene in a Dodge Ram truck prior to being arrested.

The plea agreement for the Middle District indictment referenced an attached document entitled "Factual Basis" which set forth the factual basis for the guilty plea. The plea agreement also stated that Passmore certified that "the facts set forth in the attached "Factual Basis,"... are true and were the case to go to trial, the United States would be able to prove those facts beyond a reasonable doubt." In the Factual Basis, Passmore admitted to distributing cocaine to Henry Coleman, Eric Spencer Ellis, and Louis Evan Perkins, and others. Passmore stated that he obtained this cocaine from Miami and distributed it in amounts ranging from one-eighth of an ounce to one-half of a kilogram. Further, Passmore admitted to a conversation with Peter Drayton in October of 1995 which resulted in a delivery of seven kilograms of cocaine to Drayton in November of 1995. Passmore received $147,000 from Drayton and provided him with an additional eight kilograms of cocaine. Passmore then described meeting Drayton in Atlanta, Georgia to receive money for the eight kilograms of cocaine. During this transaction, Passmore suspected that law enforcement officers where moving in and fled the scene. Finally, Passmore admitted that he distributed three kilograms of cocaine to Henry Coleman in Miami on June 22, 1997.

B. The Northern District Indictment

At Passmore's trial on the Northern District indictment, the Government presented the testimony of five witnesses. First, Johnny Earl Williams testified that he met Passmore in Jacksonville, Florida in August of 1989 through an acquaintance. Thereafter, Williams received cocaine from Passmore on a regular basis through April of 1990. Williams testified that the first time he received cocaine from Passmore, the transaction took place at a hotel on St. Augustine Highway in Jacksonville. Future transactions occurred at Passmore's home in Jacksonville. On these occasions, Williams would go to Passmore's residence alone, and would later convert the cocaine he received into crack cocaine.

Williams distributed the cocaine he received from Passmore in Fort Walton Beach, Florida. In Fort Walton, he manufactured crack cocaine at the home of his brother Eddie Armstrong. Williams then supplied the crack to a group of approximately fifteen people for distribution, including his brothers Willie Simmons and Eddie Armstrong.

In April of 1990, Williams was incarcerated on unrelated drug charges. While in prison, Williams maintained contact with Passmore, and in October of 1990, he made arrangements to put Passmore in contact with his brother Willie Simmons for the purposes of a drug transaction. Through Williams' efforts, Simmons contacted a person he knew as "Steve." Simmons then

drove to Jacksonville with a small group of people to purchase drugs from Steve. When they arrived in Jacksonville, Simmons met with Steve at his house and received crack and powder cocaine.

In March of 1994, Williams was released from prison. Shortly thereafter, Williams contacted Passmore over the telephone. In April, 1994, Passmore traveled to Fort Walton Beach from Atlanta, Georgia and delivered one-half kilogram of powder cocaine to Williams. Passmore then accompanied Williams to Eddie Armstrong's house, and a large portion of the cocaine was converted to crack cocaine. Trisha Knox, Glenda Knox, Eddie Armstrong, and Tyrone Prather we all present during the conversion process. The crack cocaine was then distributed to those present in order to be sold.

Passmore made a second trip to Fort Walton Beach within a month after the initial visit. During this trip, Passmore delivered another kilogram of cocaine to Williams. This cocaine was converted to crack cocaine by Trisha Knox at Eddie Armstrong's house and distributed by people working with Williams, including Eddie Armstrong, Tyrone Prather, Johnny Robertson, Bobby Bogan, Kelvin Davenport, Andre Lee, and Thomas Williams.

After this second trip to Fort Walton Beach, Williams began traveling to Atlanta in order to receive cocaine from Passmore. According to Williams, Passmore told him to start coming to Atlanta because it

was "getting a little warm" in Fort Walton Beach. Williams testified that he made a total of ten to fifteen trips to Atlanta, going about once or twice a month. Williams and Passmore would conduct the transactions either at Passmore's house or in a hotel room. Williams would thereafter convert the cocaine he received into crack cocaine either at his brother's home, the home of a cousin in Luverne, Alabama, or a house Williams owned in Defuniak Springs, Florida.

Williams' final purchase from Passmore took place in Orlando, Florida in May, 1995. Williams and Andre Lee drove to Orlando and purchased two kilograms of cocaine from Passmore at a Marriott hotel near the airport. Williams was arrested on drug charges shortly thereafter.

The Government's final witness at trial was Louis Perkins who testified, pursuant to Federal Rules of Evidence 404(b), that he sold crack cocaine v ith Passmore beginning in 1987. Perkins further testified that Passmore later began fronting crack cocaine to him. Perkins testified that the last transactions he had with Passmore occurred in January, 1990. The Government asserts on appeal that the evidence presented at trial regarding the Northern District indictment established a separate conspiracy from that described in the Middle District indictment to which Passmore pled guilty.

III. DISCUSSION

On appeal, the Government contends that the district court erred in dismissing the indictment in this case based upon a double jeopardy violation. Before addressing the double jeopardy issue, however, we address Passmore's contention that we lack jurisdiction to hear the Government's appeal. After reviewing why jurisdiction exists to hear the case, we conclude that the two indictments in question charge separate conspiracies and therefore the district court erred in dismissing the indictment this Northern District case.

A. Jurisdiction

Passmore argues that we lack jurisdiction to hear this appeal under 18 U.S.C. § 3731. Section 3731 provides that, "[i]n a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment... except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution." 18 U.S.C § 3731. Generally, if a district court finds that the evidence is insufficient to sustain a guilty verdict, this finding constitutes an acquittal and appeal and retrial are barred by double jeopardy. See United States v. Torkington, 874 F.2d 1441, 1444 (11th Cir. 1989). Passmore argues that the district court's dismissal of the indictment here was the equivalent of a judgment of acquittal for insufficient evidence and therefore we lack jurisdiction over the instant appeal. We disagree.

Passmore sought to terminate the Northern District proceedings on the legal ground that, regardless of his criminal culpability, he could not constitutionally be punished for his actions. Indeed, the district court determined, prior to ruling on the double jeopardy motion, that the evidence on Passmore's guilt or innocence was sufficient to submit to the jury. Thus, the district court's finding on the issue of double jeopardy can not be considered an "acquittal" such that double jeopardy bars this appeal.

Our conclusion is supported by the Supreme Court's decision in United States v. Scott, 437 U.S. 82 (1978), where the Supreme Court held that section 3731 permitted the Government to appeal the mid-trial dismissal of an indictment for improper pre-indictment delay. In reaching this conclusion, the Supreme Court drew a distinction between cases in which there has been a finding on the issue of factual guilt or innocence and those cases in which the defendant sought to terminate the proceedings without submission to either a judge or jury as to factual guilt or innocence. Id. at 96-99. The later situation, according to the Supreme Court, does not constitute an acquittal for double jeopardy purposes, and therefore an appeal by the Government is not barred regardless of the fact that a reversal would require remand for further factual determinations as to guilt or innocence. Id. at 99-100; Torkington, 1444. The instant case is similar to Scott.

Passmore attempts to avoid this conclusion by reliance on Burks v. United States, 437 U.S. 1 (1978). In

Burks, the defendant asserted the defense of insanity to a charge of armed robbery. The Sixth Circuit concluded that the defendant's motion for an acquittal was erroneously denied by the district court because the defendant set forth a prima facie case of insanity and the Government failed to rebut that defense beyond a reasonable doubt. The Sixth Circuit then remanded the case to the district court for a determination of whether a directed verdict should be entered or a new trial should be granted. The Supreme Court granted certiorari solely on the question of whether the defendant could be tried a second time where there was a finding by the court of appeals that the evidence was insufficient to sustain a guilty verdict. The Court held that in such a situation, there was, in essence, an acquittal, and double jeopardy barred retrial. Id. at 16-17.

Passmore contends that the instant appeal is similarly barred because he set forth a prima facie case that there was only one single conspiracy, and the Government failed to present sufficient evidence to rebut this case or to prove that there were indeed two conspiracies. Thus, according to Passmore, the district court's ruling was based upon a failure of proof at trial and constitutes an acquittal.

Passmore's reasoning is flawed, however. In determining that double jeopardy prevented a finding of criminal liability here, the district court made a legal conclude that we have jurisdiction to entertain the merits of the Government's appeal in this case.

B. Double Jeopardy

We review the district court's double jeopardy determination de novo. United States v. Benefield, 874 F.2d, 1503, 1505 (11th Cir. 1989). When a defendant moves to dismiss an indictment on double jeopardy grounds, he or she bears the burden of making "a prima facie nonfrivolous claim." Id., citing United States v. Stricklin, 591 F.2d 1112, 1117-18 (5th Cir. 1979). Once the defendant meets this initial burden, the Government must prove by a preponderance of the evidence that the two indictments charge separate crimes. Benefield, 874 F.2d at 1505.

To establish a prima facie claim, Passmore must show that the two offenses are the same in both law and fact. When the offenses at issues are conspiracies, the determination of a double jeopardy claim depends upon whether there was more than one unlawful agreement. Id. In United States v. Marable, 578 F.2d 151 (5th Cir. 1978),[2] the Fifth Circuit noted the difficulties inherent in determining the parameters of a conspiracy in violation of 21 U.S.C § 846 and enumerated five factors to examine to help determine whether single or multiple conspiracies exist.

These five factors are:

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[2] In Bonner v. City of Prichard, 661 F.2d 1206, 1209-11 (11th Cir. 1989) (en banc), this Court adopted the decisions of the Fifth Circuit prior to October 1, 1981 as binding precedent.

> (1) time, (2) persons acting as co-conspirators, (3) the statutory offenses charged in the indictments, (4) the overt acts charged by the government of any other description of the offenses charged whichindicates the nature and scope of the activity which the government sought to punish in each case, and (5) places where the events allegedas part of the conspiracy took place.

Id. at 154; cited in United States v. Nyhuis, 8 F.3d 731 (11th Cir. 1993). Applying these factors, we conclude that the Middle District and Northern District indictments describe separate conspiracies and that the district court erred in finding otherwise.

The first factor does weigh in Passmore's favor. The Middle District indictment charged that Passmore conspired to distribute cocaine and cocaine base from 1986 to December of 1997. The Northern District indictment, on the other hand, charged that Passmore so conspired from an unknown date, but at least February 24, 1991, through February 21, 1996. As a result there is some overlap in the time periods charged. Such an overlap alone, however, does not mean that the two indictments involve the same conspiracy. See Nyhuis, 8 F.3d at 736; see also Benefield, 874 F.2d at 1508 (noting that a defendant may be involved in more than one conspiracy at the same time).

Regarding the second factor, neither indictment specifically names any co-conspirators. Because the broad language of "other persons known and unknown" is present in both indictments, some overlap is conceivable. This is not a case, however, where the double jeopardy motion was made prior to trial and we have limited information regarding what the evidence will show. At the time the motion to dismiss was made, the Government had concluded its evidence at trial. A review of the trial record from trial, and the materials submitted from the Middle District case, shows absolutely no evidence of any overlap in the individuals involved in the two cases other than Passmore.

Of the co-conspirators mentioned in the Factual Basis, Murphy's affidavit, or the amended list of co-conspirators submitted in the Middle District case, the only individual other than Passmore whose name is also connected with the Northern District case is Louis Perkins. Perkins, however, only testified in the Northern District case as a Rule 404(b) witness. There is also no evidence that any of the witnesses or alleged co-conspirators in the Northern District case were aware of or involved in the activities charged in the Middle District indictment. Accordingly, there is no overlap in the co-conspirators between the two cases and the second factor is strong evidence of the existence of two separate conspiracies.

The third Marable factor is the statutory offenses charged in the two indictments. Both indictments charge conspiracies to distribute cocaine and cocaine base in

violation of 21 U.S.C. § 846. Accordingly, this third factor weighs in Passmore's favor.

The fourth consideration is the "overt acts charged in the two indictments or any other description of the offense which indicates the nature and scope of the agreement." Marable, 578 F.2d at 154. Neither indictment here charges any overt acts. And, although the descriptions of the acts taken in the two cases show a similar pattern of activity, there is no evidence of any action by Passmore, or any co-conspirator, in one of the cases which can be said to have aided or been a part of the activity charged in the other case. Thus, this fourth factor does not weigh in Passmore's favor.

The final Marable factor is the location of the activities in question. Some overlap in location is conceivable under the broad allegations of the two indictments charging that Passmore conspired to distribute "in the Middle District of Florida and elsewhere" and "in the Northern District of Florida and elsewhere." Further, Passmore provided cocaine and cocaine base to co-conspirators in both cases in Atlanta and Jacksonville. The evidence shows, however, that the narcotics were intended to be, and were in fact, distributed in different markets. The Factual Basis of Passmore's plea in the Middle District case indicates that the cocaine and cocaine base involved in that case was distributed in Jacksonville, while it is clear that the cocaine and cocaine base involved in this case was ultimately sold in the Fort Walton Beach area. Thus, to the extent that this factor weighs in Passmore's favor,

that weight is not great. As this Court stated in Benefield, the key to the double jeopardy determination in cases such as this one is whether there exists more than one unlawful agreement. Benefield, 874 F.2d at 1505. We conclude based upon an examination of the above factors that the evidence in this case shows two separate agreements to distribute cocaine and cocaine base, and thus Passmore failed to show a prima facie case of a double jeopardy violation. See Nyhuis, 8 F.3d at 738 (finding that the defendant failed to present a prima facie claim due in part to the "almost complete diversity between the conspirators.").

Passmore attempts to avoid this conclusion by pointing to several additional facts. First, Passmore calls our attention to the fact that the same Dodge Ram truck was used in both conspiracies. Specifically, Passmore points out that the Northern District indictment contained a criminal forfeiture count seeking the forfeiture of the Dodge Ram, and the Middle District indictment alleged that Passmore was driving the same Ram truck when he fled the scene of a payoff in Atlanta. This is not a situation, however, in which the truck was a center of operations for activities involved in both charged conspiracies, or the truck itself was the object of one or both of the alleged conspiracies. Rather, the only evidence is that Passmore drove the truck to a rendevous in one alleged conspiracy, and may have used the truck in, or obtained it through proceeds of, the other. This is simply not enough to link the two conspiracies.

Passmore also alleges that the fact that he was the "key" player in both cases shows that there was only one conspiracy. While there is case law referring to a defendant as a "hub" of conspiratorial activity, see United States v. Taylor, 17 F.3d 333, 337 (11th Cir. 1994); United States v. Stitzer, 785 F.2d 1506, 1517 (11th Cir. 1986), and co-conspirators do not have to know each other to be part of the conspiracy, see Taylor, 17 F.3d at 337, there must be some knowledge on the part of co-conspirators of the "overall purpose and scope" of the conspiracy. See Stitzer, 785 F.2d at 1518. In this case, there is no evidence that that co-conspirators in either case knew about the co-conspirators, or the activities, in the other case. Nor is there evidence that the co-conspirators were aware that Passmore was involved in drug trafficking activity elsewhere.

Finally, Passmore contends that the fact that the two indictments were issued two weeks apart demonstrates the existence of only one conspiracy. This fact, however, does not show anything other than that there were simultaneous investigations proceeding at a similar pace. It in no way speaks to the content of those investigations.

In short, the district court erred in granting Passmore's motion to dismiss the indictment in this case. Because we so conclude, it is unnecessary to reach the Government's claim that it was entitled to an evidentiary hearing to show the existence of two separate conspiracies.

III. CONCLUSION

We conclude that jurisdiction exists over the Government's appeal of the district court's dismissal of the indictment, and that the district court erred in this dismissal. We therefore reverse the dismissal of the indictment in this case and remand this case for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
MAR 28 2000
THOMAS K. KAHN
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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-12325 -BB

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

versus

STEVEN EUGENE PASSMORE,

Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of Florida

BEFORE: BLACK, HULL, and MARCUS, Circuit Judges.

PER CURIAM:

The petition (s) for rehearing filed by the Appellee, Steven Eugene Passmore, is DENIED.

ENTERED FOR THE COURT:

/s/ Frank M. Hull
UNITED STATES CIRCUIT JUDGE